No. 50144-9-II

COA#50144-9

COURT OF APPEALS, DIVISION **TWO**
STATE OF WASHINGTON

DUNGENESS HEIGHTS HOMEOWNERS, LLC, Appellant

v.

RADIO PACIFIC, INC., SHIRLEY TJEMSLAND, and CLALLAM COUNTY, a political subdivision of the State of Washington, Respondents

Appeal from the Superior Court of Clallam County
The Honorable **Judge Erik Rohrer**
Clallam County Superior Court Cause No. **16-2-00226-1**

BRIEF OF RESPONDENTS RADIO PACIFIC, INC. and SHIRLEY TJEMSLAND

Amended 9/12/17

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A. RESPONSE TO ASSIGNMENTS OF ERROR

Clallam County Superior Court Judge Erik Rohrer did not err by (1) affirming the Findings of Fact and Conclusions of Law (hereinafter "Findings") of Clallam County Hearing Examiner William Payne ("Examiner"); (2) awarding attorney fees to Respondents[1]; or (3) finding that Appellant did not meet any of the standards of review for reversal under LUPA. As for each alleged Error committed by the Examiner:

Nos. 1-13. As demonstrated below, the Examiner did not so-error.

No. 14. Respondents (collectively "RPI") concede to Error Nos. 14 (a) and (c); RPI partially concedes to Error 14 (b), but only with respect to the typo regarding "Parcel 4." RPI does not concede to Error No. 14 (d).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

To the extent that Appellant (hereinafter "DHH") sets forth the "Major Issues Before the Court" at page 7,[2] those "major issues," as outlined by the DHH, are not issues of law. Instead, the ultimate issues before this Court are whether the Findings (1) were based on substantial evidence, in light of the whole record before this Court; (2) were not based on an erroneous interpretation of the law; and (3) were not based on a

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[1] An award of attorney fees is reviewed for abuse of discretion. *See Curhan v. Chelan County*, 156 Wn.App. 30, 37, 230 P.3d 1083, 1086 (2010).

[2] When enumerating a "page" number, RPI refers to the Brief of Appellant.

clearly erroneous application of the law to the facts under RCW 36.70C.130 (1).

C. COUNTER-STATEMENT OF THE CASE

On March 3, 2016, the Examiner issued Findings with respect to CUP 2015-0007 and VAR 2015-0004, an application from landowner Shirley Tjemsland for a conditional use permit and variance ("Proposal"), to construct a WCF 150 feet in height, 50 feet above the height permitted for WCF in the applicable zone. *See* Administrative Record (AR) at 1543. The Examiner considered various facts:

The Clallam County Department of Community Development ("Staff"), in a staff report dated December 2, 2015, originally recommended denial of the Proposal. AR 0513 at ¶ 1-2. The primary concerns raised in the first staff report pertained to the following: (1) Aesthetic impact of the proposed design of the mono-pine (now a mono-fir based on Staff's recommendations); (2) a need for additional photo simulations demonstrating the appearance of the height addition to the Proposal, and the impacts of that height addition to the surrounding area; (3) alternative-site analyses; (4) co-location analyses; and (5) analysis of "why the proposed [WCF] could not locate within a Preference 2 Area" and "why the proposed mono-pine (now a mono-fir) needs to be 150 feet in height." AR at 0513.

Subsequent to the December 2 recommendation for denial, the applicant Ken Hays, on behalf of Shirley Tjemsland, and Bryon Gunnerson, agent for Radio Pacific Inc. ("RPI") and president of Gunnerson Communications Site Services, submitted 15 supplemental exhibits. AR at 0513 ¶ 3.[3] On January 20, after receipt of these additional exhibits, Staff issued an amended staff report ("Amended Report") recommending approval of the Proposal. The Amended Report acknowledged the following evidence:

First, an additional good faith co-location analysis, showing "why T-Mobile cannot co-locate on existing towers in the area" and "why the proposed tower could accommodate up to four cellular providers [sic] antenna arrays and also emergency service [providers] antennas" on the WCF (addressing concern number four above); second, an alternative-site analysis, showing the location of "9 other WCF Support Structures and other structures where WCF antennas are located in the area [which addressed] why T-Mobile's antennas could not be located at these existing facilities" (addressing concern numbers three and five); third, a redesigned mono-fir and photo simulation from 21 locations around the 150-foot Proposal, which included "having the mono-pole resemble [a] Douglas fir tree that the applicant

[3] These are Exhibits 45A through 45O, at AR 0541-1007.

and an arborist observed in the area" (addressing concerns number one and two), which Staff found "would reduce the appearance of the WCF from surrounding areas"; and (4) fourth, a "height and coverage analysis" submitted for Respondent RPI and T-Mobile, demonstrating a 19-percent increase in listenership to RPI's FM 104.9 radio station "if the height of the FM antennas were increased from 100 to 150 feet in height," and an increase in "approximately 11 percent [in non-existent cellular coverage] over the entire 91 sq mile services area" with a 50-foot height increase (addressing concern number five). AR 0513 ¶ 3; 0514 ¶ 6-7; 0521 ¶ 3 and 5; 0520 ¶ 2; 0522 ¶ 4; 0527 ¶ 2.

To mitigate visual impacts of the WCF, RPI submitted proof—in Exhibit 45I—that "[A] series of limbs on several Douglas Fir trees within the 150ft buffer at the Tjemsland Property[4] were measured for the limb lengths and tree heights by an arborist on [January 10, 2016]," indicating that "[T]his will help in determining what can be manufactured vs the likeness of the surroundings." AR at 0879. Importantly, Staff noted that based on the new design submitted by RPI, "the mono-pole, antennas, cables and appurtenances would be colored the same color as Douglas fir trunks and foliage found in the area." AR 0514 ¶ 6.

[4] Hereinafter, the "Tjemsland Property" is a reference to Tjemsland Lots 3 and 4.

As for supplemental good-faith co-location analysis—whereby a wireless provider "co-locates" with other providers on a WCF—RPI provided an in-depth graph of each potential wireless carrier or similar party that may seek to co-locate at the proposed site. AR at 1003-1004. Additionally, Mr. Gunnerson indicated at the January 27, 2016 public hearing on the Proposal ("Hearing") that the Clallam County Sheriff's Department is also interested in co-locating at the proposed site. Administrative Report of Proceedings (ARP) at 32, Lines 21-23; *See Also* AR at 1004.

With respect to alternative-site analysis—for location of the WCF—Mr. Gunnerson submitted supplemental exhibit 45K on January 15, 2016. AR 0918-0946. His additional search evidenced that various sites were either "insufficient for wireless carrier loads" or were "not in [the] coverage area" that the proposed WCF would serve. AR 0921-0922. Mr. Gunnerson noted that the Potholes Ridge, at the top of which the Proposal is located, "is the greatest single inhibiting factor for locating wireless facilities at any other single Preference Area." AR 0923.[5] Furthermore, at the Hearing, Staff further outlined,

[5] Mr. Gunnerson further demonstrated that T-Mobile, Sprint, AT&T and Verizon, wireless carriers, would require nine power pole replacements to fill the need provided by the 150-foot WCF; and Staff, in the Amended Report, found that "[B]ased on the cost and process of a power pole replacement, it is unlikely that if this proposal is denied that the wireless service providers would construct 9 or

in accordance with Exhibit 45K, that "[T]here are four ridges in this area (Dungeness)...This *one location* would provide coverage on both sides of these four ridges." ARP at 11, 9-12 (emphasis added).

Additionally, Becky Todd, zoning manager for T-Mobile, testified as to alternative sites at the Hearing. She informed the Examiner that T-Mobile, after searching for alternative sites in Clallam County, "didn't come up with any alternatives that RPI had not already found. All of the existing sites were submitted to T-Mobile to look at...The rest of [these alternative sites] would not meet [a significant gap in wireless coverage]." ARP 28, 2-7.

Mr. Gunnerson submitted additional height and coverage analysis in Exhibit 45J. This included exhaustive analysis of multiple configurations of wireless carrier and FM antennas, at various locations on the mono-fir, and at different heights of the mono-fir. AR 0898-0917. He included graphs depicting up to four wireless carriers underneath the FM antennas of RPI. AR 0901. He included graphs demonstrating a marked difference in "interference free" coverage for the FM station (for RPI) at 100 feet and 150 feet. AR 0904-0906. He provided the same analysis for wireless coverage. AR at 0907-0908.

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10 power pole replacements." Thus, the alternative to not building this WCF is no improvement in wireless service for the entire region. AR at 0938; *See Also* AR 0527 ¶ 6 (Staff concurring in this assessment).

Furthermore, at the Hearing, Mr. Dave Girling, a planning and optimization engineer for T-Mobile, testified as to why co-location at 135 feet on the proposed mono-fir would fill a significant gap in wireless coverage for T-Mobile. Underlining that co-locating at 75 feet would only cover an additional 2,451 people, Mr. Girling testified that 4,000 people would receive additional coverage if T-Mobile co-located at 135 feet. ARP at 31, 2-25.

Linda Atkins, counsel for T-Mobile, stated at the Hearing that based on the testimony of Mr. Girling, and documentary evidence proffered by T-Mobile, particularly Exhibit 79 at AR 1211-1346, that "it's pretty clear that there is a significant gap in T-Mobile's coverage in this area." ARP 119, 8-9. Of course, Mr. Gunnerson had already submitted evidence that other wireless carriers—particularly Sprint, AT&T and Verizon—would also see an increase in coverage if a height extension was granted. AR 0933.

With respect to the proposed site itself, Staff noted that the Proposal is located "on a heavily forested ridge" and hitherto undeveloped land—which has remained undeveloped since 1942. AR 0538 ¶ 1 and 3. Counsel for RPI testified at the Hearing that the proposed site "is surrounded by hazard areas, landslide areas, potholes,

gravel pit, gravel-covered rural access roads, and a heavily forested ridge." ARP 16, 12-15.

Additionally, RPI submitted evidence of an exclusive easement granted by Ms.Tjemsland to RPI, for placement of the Proposal; the easement restricts development within 175 feet of the base of the proposed WCF. AR 0101 ¶ 8-9; 0104. Staff took note of this: "[The 175-foot exclusive easement that] restricts all development on this unimproved portion of [Lot 3] meets the intent [of the 165-foot setback requirement for 150-foot WCFs]." AR 0529 ¶ 2.

Counsel for RPI further underlined at the Hearing that "the lots that are situated to the north of the [proposed] WCF tower, these 160 lots, are faced toward the Strait of Juan de Fuca. Their primary point of view is toward the Strait of Juan de Fuca, not toward" the proposed site. ARP 16, 20-24; *See Also* AR 0519 ¶ 5 (Staff making a similar statement which was not challenged at the Hearing).

With respect to concerns raised by the DHH regarding property values, RPI submitted three separate appraisal reports of properties in Clallam County, at AR 1456-1483; these reports indicated that living in close proximity to a WCF in Clallam County would have no effect on property values, positive or negative. AR 1479 ¶ 2-7. And the Examiner acknowledged this evidence. AR at 1537 ¶ 1. Counsel for

the DHH made no request to keep the record open in order to rebut the three appraisal reports submitted by RPI. Counsel for the DHH did not appear at the Hearing.

The Examiner approved the Proposal. AR 1543. As part of his Decision, the Examiner imposed conditions, to lessen any adverse visual impacts of the Proposal. AR 1543 ¶ 1 and 3. The Examiner also stated that "[The Examiner] will make a site visit. I plan on doing that. And I'll hold the record open for five days as was asked by the Applicant." ARP at 46, 8-10. Furthermore, the Examiner noted in the Findings that the DHH did not provide "area specific evidence of a decrease in property values in the area of the proposed WCF."AR 1537 ¶ 1. The DHH filed a timely appeal of the Findings under the Land Use Petition Act ("LUPA").

Clallam County Superior Court Judge Erik Rohrer affirmed the Examiner on February 24, 2017. RPI respectfully requests that this Court affirm the Examiner and Judge Rohrer, and award reasonable attorney fees and costs to RPI, as the prevailing party, pursuant to RCW 4.84.370.

D. ARGUMENT

Under LUPA, the courts shall review the administrative determination below "as a whole for substantial evidence supporting the

decision." *Curhan v. Chelan County*, 156 Wn.App. 30, 35, 230 P.3d 1083, 1085 (2010), citing *City of University Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001). In every LUPA action, any appellate court must give "substantial deference to both the legal and factual determinations of a hearing examiner as the local authority with expertise in land use regulations." *City of Medina v. T-Mobile USA, Inc.*, 123 Wn.App. 19, 24, 95 P.3d 377, 379 (2004).

Ultimately, in any LUPA action, the appellate court shall limit its review to the administrative record before the highest forum exercising fact-finding authority: the Examiner. *See Peste v. Mason County*, 133 Wn.App. 456, 466, 136 P.3d 140, 144 (2006).

Substantial Evidence Supports the Findings under RCW 36.70C.130 (1)(c). The Findings must be affirmed if this Court concludes that there exists a "sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true." *Woods v. Kittitas County*, 162 Wn.2d 597, 616, 174 P.3d 25, 35 (2007). Most importantly, "'[S]ubstantial evidence' is evidence sufficient to convince an *unprejudiced*, rational person that a finding is true." *Peste*, 133 Wn.App. at 477 (emphasis added).

Under the substantial evidence standard, and as a longstanding principle of administrative law, weighing the credibility of the evidence

is "for the trier of fact [the Examiner], not the appellate court." *Russell v. Department of Human Rights*, 70 Wn.App. 408, 421, 854 P.2d 1087, 1094 (1993). Additionally, "[T]he substantial evidence standard is deferential; it does not permit a reviewing court to substitute its view of the facts for that of the agency," if substantial evidence is found. *Yakima Police Patrolmen's Ass'n v. City of Yakima*, 153 Wn.App. 541, 553, 222 P.3d 1217, 1224 (2009). The Findings are supported by substantial evidence; consequently, Errors No. 1-13 are not supported by the facts:

With respect to error No. 1 in Section II (A)[6] and pages 13-17 of the DHH's opening brief, involving setbacks, this Court should affirm the Examiner because the Findings are supported by substantial evidence. This Court should affirm the Examiner because substantial evidence demonstrates that Ms. Tjemsland seeks to develop her own land: the Proposal shall be located in an area where Lots 3 and 4—both owned by Ms. Tjemsland—are abutted by each other, not by the land of anyone else. Consequently, the Proposal is not contrary to the purpose of setbacks—to protect adjoining uses, provide safety from fire and promote the general welfare.

[6] Hereinafter, each reference to an error No. is in reference to Section II (A) of the DHH's opening brief.

Whether a land-use ordinance is ambiguous or unambiguous, land-use ordinances "are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose." *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569, 571 (1956). Pursuant to *Morin*, the true "scope and purpose" of the setback ordinance in this case, Clallam County Code ("CCC") Section 33.49.520 (2), is applicable to Ms. Tjemsland, as the sole property owner to which the applicable setback ordinance applies, developing an area of her land that does not share a "property line" with any member of the DHH.

This Court should affirm the Examiner because under CCC 33.49.520 (2), setbacks from a WCF "shall be equal to 110 percent of the height of the support tower or 150 feet, whichever is greater," and RPI proffered substantial evidence to meet the intent of that requirement.[7] In this case, RPI offered evidence that Ms. Tjemsland and

[7] Importantly, the previously approved CUP2015-0003, for a 100-foot WCF at the same location, was subject to the same exclusive easement that the DHH now challenges—110% of 100 (feet) equates to a 110-foot setback, and would also allegedly violate the "plain language" of 33.49.520 (2); more importantly, the DHH never challenged the issuance of CUP2015-0003; consequently, the same setback challenge raised now is arguably time-barred by RCW 36.70C.040 (3) (21-day period for filing appeal of a land use decision).

RPI entered into an exclusive easement that restricts development within 175 feet from the base of the WCF, eviscerating the "property line" between Lot 3 and Lot 4. AR 0104.

The DHH, at page 17, contends that because the exclusive easement does not "change the property lines"—which belong to Ms. Tjemsland as the sole landowner—that substantial evidence does not support the conclusion that the intent of CCC 33.49.520 (2) has been met. Admittedly, the Examiner did not conclude that the exclusive easement comported with the "plain language" of CCC 33.49.520 (2); instead, the Examiner found that substantial evidence—at AR 0104 and AR 0101 ¶ 8-9—would lead a reasonable person to conclude that the intent of the setback requirements has been met. *See Also* AR 0529 ¶ 2 (Staff supporting the conclusion that the exclusive easement meets the intent of the setback requirements).

Because of the above substantial evidence—before an unprejudiced, rational person—the Examiner did not extend the "plain language" of the setback requirements "to cases not clearly within their scope and purpose." *Morin*, 49 Wn.2d at 279; *See Also Peste*, 133 Wn.App. at 477. This Court should affirm the Examiner. His Findings are based on substantial evidence.

As for error No. 2, concerning the siting priorities of CCC 33.49.410, at pages 17-21, this Court should affirm the Examiner because his Findings are based on substantial evidence. The DHH alleges that the Examiner erred by "not implementing" the siting priorities set forth under CCC 33.49.410 in conjunction with CCC 33.49.400 (1), which sets forth "[C]riteria for prioritizing preference areas and [WCF] siting." But the record suggests otherwise. At AR 1536 ¶ 4-1537 ¶ 2, the Examiner delineated the five different criteria for siting WCF in Clallam County, set forth under CCC 33.49.400 (1), and his Findings as to those criteria are supported by the facts:

First, Staff reminded the Examiner, on numerous occasions, that the WCF would be located in a "Rural Neighborhood Conservation (NC) Zone, which is a Preference Area 3." AR at 0514 ¶ 2. Second, the Examiner had substantial evidence submitted by Mr. Gunnerson indicating a rigorous search for alternative sites, demonstrating that various sites were either "insufficient for wireless carrier loads" or were "not in [the] coverage area [targeted for improved wireless services]" that the proposed WCF would serve. AR 0921-0922. Third, the zoning manager for T-Mobile indicated at the hearing that T-Mobile "didn't come up with any alternatives that RPI had not already found. All of the existing sites were submitted to T-Mobile to look at...The rest of [these

alternative sites] would not meet [a significant gap in wireless coverage in the coverage area]." ARP 28, 2-7.

Furthermore, the Examiner was also aware of Exhibit 79, in which T-Mobile (1) indicated that "[T]aller [WCF] heights generally allow the wireless signal to travel farther"; (2) delineated that the Proposal would allow T-Mobile "to cover approximately 59% of the coverage area," as opposed to "only 26.5% of the population within the coverage area" on a 100-foot WCF; (3) cited case law[8] for the proposition that seeing a WCF "from different places round the area" does not render a WCF materially detrimental to the public welfare; and (4) further reminding the Examiner of Exhibit 45I, at AR 0873-0897, where RPI outlined exhaustive efforts to camouflage the WCF, to avoid any adverse visual impacts. AR 1213 ¶ 2-3; 1214 ¶ 3; *See Also* AR 1248-1256; 1222-1238.

Because under the substantial evidence standard, Washington courts "will 'not overturn an agency decision even where the opposing party reasonably disputes the evidence with evidence of equal dignity'," this Court should affirm the Examiner. *Rosemere Neighborhood Ass'n v. Clark County*, 170 Wn.App. 859, 872, 290 P.3d 142, 151 (2012), quoting *Ferry County v. Concerned Friends of Ferry County*, 121

[8] *Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wn.App. 461, 474, 24 P.3d 1079, 1087 (2001).

Wn.App. 850, 856, 90 P.3d 698 (2004). The DHH submits photos of alternative sites.[9] But this evidence—even if it were of "equal dignity" under *Rosemere*—completely ignores that RPI, in addition to the evidence above, (1) offered proof that wireless providers would actually need 9 or 10 power pole replacements to achieve coverage objectives, as shown at AR 0938 and AR 0527 ¶ 6; and (2) offered Exhibit 45K at AR 0918-0946, specifically AR 0922, outlining the rigorous search for alternative sites in the area, and further establishing at AR 0923 that "[A]ll other possible wireless facilities built regardless of being in [sic] Preference Area 3 (100ft maximum) or Preference are [sic] 2 would also fail to propagate radio signals beyond the Potholes Ridge," which was delineated as "the greatest single inhibiting factor for locating wireless facilities at any other single Preference Area."

Because weighing the credibility of the evidence is "for the trier of fact [the Examiner], not the appellate court," this Court should affirm the Examiner. *Russell* 70 Wn.App. at 421. At page 21, the DHH alleges that there was "no substantial evidence of application of CCC 33.49.410." But the record evidences otherwise. At AR 1536, the Examiner clearly stated that "C.C.C. 33.49 provides guidance for siting and developing

[9] These photographs do not include computer coverage analysis, existing communication infrastructure parameters, interference analysis, and comprehension of coordinating wireless and FM radio signals with Canada, including compliance with FCC rules; these are simply photographs.

wireless WCF's in Clallam County." and proceeded to apply the above facts in analyzing that siting criteria. Based on the above, an "unprejudiced, rational person" would find substantial evidence to demonstrate compliance with the specific siting priorities of CCC 33.49.400 (1), in conjunction with the Preference-Area siting priorities of CCC 33.49.410. This Court should affirm the Examiner.

Land Use Decisions Are Based on Evidence, Not Public Perception

Because general community opposition "cannot alone justify a local land use decision," this Court should affirm the Examiner. *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 797, 903 P.2d 986, 994 (1995); *See Also Maranatha Mining Inc. v. Pierce County*, 59 Wn.App. 795, 805, 801 P.2d 985, 992 (reversing decision of county council denying land use permit based on "community displeasure" when the applicant "demonstrated a willingness to mitigate any and every legitimate problem" presented by the proposal). With respect to error No. 3, concerning the visual impacts of the height of the WCF, at pages 22-23, this Court should affirm the Examiner because the Findings are supported by substantial evidence:

The CCC requires the utilization of adequate camouflage techniques that are "designed and constructed to resemble an object that is not a WCF and which is typically present in the environment." CCC

33.49.300 (10) (defining the word "camouflage"). RPI provided such evidence to demonstrate adequate camouflage:

Staff underlined that the proposed camouflage would include "having the mono-pole resemble [a] Douglas fir tree that the applicant and an arborist observed in the area," which Staff found "would reduce the appearance of the WCF from surrounding areas"; and RPI provided ample evidence to demonstrate this. AR at 0514; 0878-0879; 1006—quoted above.[10] Consequently, an unprejudiced person would find that although the Proposal is in a Preference 3 area and would be 50 feet over the height permitted for WCF in such areas, RPI proffered substantial evidence to mitigate visual impacts of any height increase. The DHH again fails to demonstrate a lack of substantial evidence. This Court should affirm the Examiner.

Substantial Evidence demonstrates consistency with the Clallam County Zoning Code

Because Washington courts "will 'not overturn an agency decision even where the opposing party reasonably disputes the evidence with evidence of equal dignity'," this Court should affirm the Examiner. *Rosemere*, 170 Wn.App. at 859. As for error No. 4, pertaining to the

[10] Staff also noted that "[A] mix of land uses should be allowed in rural lands, including...essential public facilities," and further found that the WCF met the definition of an "essential public facility." AR 0519 ¶ 1 and ¶ 3.

consistency of the Proposal with the CCC, at pages 22-27, this Court should affirm the Examiner because the Findings are supported by substantial evidence. A specifically delineated purpose of Clallam CCC 33.49, the CCC section applicable to the siting of WCF, is to "[A]ccommodate an increased need for effective wireless communication services," while protecting the visual and aesthetic features of Clallam County. CCC 33.49.100 (2)(b). RPI has done so here:

As indicated above, RPI took ample care to search for alternative sites, and took ample care to obtain adequate camouflage for the Proposal. AR at AR 0918-0946; 0514; 0878-0879; 1006; and ARP ARP 28, 2-7—quoted above. A reasonable person—viewing the facts most favorably to RPI—would find that there is not only an increased need for wireless telecommunication services in Clallam County, as evidenced by the 11-percent increase in cellular coverage if the 50-foot height extension were granted, but also that RPI took great care to make the Proposal consistent with the CCC.

With respect to error No. 5, at pages 22-25, which asserts that the conditional use permit and variance are simply invalid, this is such a broad assertion that RPI will simply rest on the remainder of this brief—and the fact that this Proposal has been approved on three separate

levels: Staff, the Examiner, and Judge Rohrer—to refute this claimed error. Importantly, "the overwhelming purpose of LUPA was to unburden land use decisions from protracted litigation." *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 421, 120 P.3d 56 (2005).

The Findings Related to "Special Circumstances" Are Supported by Substantial Evidence and the Clallam County Code, Therefore the Findings Should Be Upheld

Because "'[S]ubstantial evidence' is evidence sufficient to convince an unprejudiced, rational person that a finding is true," this Court should affirm the Examiner. *Peste*, 133 Wn.App. at 477. As for error No. 6, at pages 25-32, concerning whether special circumstances are applicable to the Tjemsland Property, such that strict application of the WCF height requirements in CCC 33.49.520 (1) would deprive Ms. Tjesmland of the "rights and privileges" of neighboring property owners, this Court should affirm the Examiner because the Findings are based on substantial evidence:

First, because a state agency is not involved in this matter, the Administrative Procedures Act, RCW 34.05, does not apply. *See* RCW 34.05.010 (2) (defining the word "agency"); *See Also Chaussee v. Snohomish County Council*, 38 Wn.App. 630, 637, 689 P.2d 1084, 1090 (1984) (declining to extend RCW 34.05 to a case involving a local land use decision). Consequently, there is no reason for this Court to apply

the "correct law" test set forth in the *Fisher* case referenced at page 12 of the DHH's opening brief. There is no reason for this Court to blend together the three separate and distinct standards of review relied upon in this case: RCW 36.70C.130(1)(b)-(d). Instead, this Court should simply apply LUPA precedent involving the application of RCW 36.70C.130 (1)(c) to local land use decisions, when considering whether substantial evidence supports the Findings.

Second, Clallam County is an Article XI § 11 local government with general police power, and the Hearing Examiner is limited to interpreting his own code, insofar as that code is not in conflict with the general laws of Washington State. Because the DHH has set forth no evidence demonstrating that CCC 33.30.030 (1) is in conflict with the general laws of this state, there would have been no reason for the Examiner to interpret other general laws. That is why the Examiner did not compare CCC 33.30.030 (1) to RCW 36.70.020 (14) (defining "variance") or RCW 35A.63.110 (2)(b) ("special circumstances" criteria as applied by code cities). Therefore, this Court should limit review to whether the Examiner had substantial evidence to support a finding of "special circumstances" under CCC 33.30.030 (1).

Third, substantial evidence demonstrates that there are indeed special circumstances applicable to Lot 4, including "size, shape,

topography, location" of the Tjemsland Property. According to Adapt Engineering ("Adapt"), a reputable engineering firm, Lot 4 is located on land that has been designated as undeveloped forest land since 1942. AR 0215 ¶ 6. Lot 4 is mostly "forested land with gravel covered rural access roads." *Id.* ¶ 3. Additionally, according to Adapt, "[A]ll other adjoining and adjacent properties [to Lot 4] support residential properties." *Id.* ¶ 4. In other words, even if the building of a home was the only permitted use to which Ms. Tjemsland could put her land, even that use would not be feasible. That is the reason the CCC permits variances.

Approximately 3-4% of the Tjemsland Property (Lots 3 and 4) is suitable for the permitted uses within an NC Zone,[11] based on (1) there being two 40 and 50-feet-deep potholes on 10% of her property; (2) 56% of that property being designated a hazard area; (3) 18% of the property being located in landslide and/or critical areas, or otherwise undevelopable land; and (4) 12% constituting unbuildable buffer and/or easement area, necessary for the lawful siting of the Proposal. AR 0970.

Based on the above substantial evidence, the Examiner found that "[A]lthough [Ms. Tjemsland] has been able to build a single-family

[11] Permitted uses—without a variance—of property within an NC Zone are as follows: (1) agriculture; (2) bed and breakfast inns; (3) commercial horse facilities; (4) family day care providers; (5) home enterprises; (6) Rural Neighborhood Conservation overlay developments; (7) Rural Neighborhood Conservation cluster developments; (8) single-family dwelling units; and (9) timber harvesting. *See* CCC 33.10.015 (2).

residence on a portion of the land, the remainder is unsuitable for the type of development that other property owners in the vicinity have been able to enjoy."[12] AR 1540 ¶ 3. And RCW 36.70C.130(1)(c) "does not permit a reviewing court to substitute its view of the facts for that of the agency" if substantial evidence is found. *Yakima*, 153 Wn.App. at 553. Review of this matter is limited to the record below.

Fourth, substantial evidence demonstrates that because of these special circumstances, "strict application" of the CCC 33.49.520 (1) height restrictions would deprive Ms. Tjemsland of rights and privileges enjoyed by other property owners in the surrounding area. Admittedly, the "rights and privileges" referenced in CCC 33.30.030 (1) must be those common to surrounding landowners. However, "rights and privileges" cannot be construed as the exact same rights and privileges of surrounding landowners, and the Examiner never interpreted a "statute of statewide application" when evaluating these "rights and privileges." He evaluated the facts, in accordance with the CCC:

Under *Peste*, a reasonable person would note that the Tjemsland Property is unlike any other property in the surrounding area. Under

[12] Furthermore, use of the Tjemsland Property for any of the permitted uses at Footnote 11 could have an equally substantial effect on the surrounding rural neighborhood. For example, use of the Tjemsland Property for timber harvesting would increase noise pollution. Use of the Tjemsland Property for agriculture could increase pesticide use. The list goes on and speculation abounds.

Peste, an unprejudiced and rational person would find that approximately 97% of the Tjemsland Property is unbuildable for the permitted uses set forth above. The "declared premise" of the Examiner was that the buildable portion of the Tjemsland Property is "unsuitable for the permitted uses" in the applicable NC Zone, and therefore that denying the variance would deny Ms. Tjemsland the ability to develop her property, as any other homeowner would be able to do, albeit in a dissimilar fashion. AR 1540 ¶ 3.

Of course, T-Mobile indicated that it is unlikely to co-locate at the proposed site if the 50-foot height extension is not granted. AR at 0979. Consequently, a reasonable person could conclude that strict application of the height requirements would prevent Ms. Tjemsland not only from providing an essential public service, but from making full use of her land, as any other homeowner in the area would be able to do, albeit in a dissimilar fashion. That is the reason the CCC permits variances.

The question before this Court under RCW 36.70C.130 (1)(c) is not whether a homeowner has an inherent right to build an over-height WCF in a Preference 3 area. Instead, the question is whether a sufficient quantum of evidence would lead a reasonable person to agree with the "declared premise" of the Examiner set forth at AR 1540 ¶ 3. The answer to that question is yes, and even if the DHH disputes the above

evidence with evidence of "equal dignity," that would not give this Court grounds to reverse the Examiner. *See Rosemere* at 872. And the DHH has certainly not submitted such evidence of equal dignity.

Furthermore, not only is the Examiner's "declared premise" supported by substantial evidence; the declared premise comports with interpretations of "special circumstances" by other hearing examiners. In *Medina*, a substantially similar zoning code was at issue, which specifically read that a variance may be granted by showing "[T]hat such variance is necessary, because of special circumstances relating to the size, shape, topography, location or surroundings of the subject property, to provide it with the use rights and privileges permitted to other properties in the vicinity and in the zone in which the subject property is located." In *Medina*, a hearing examiner found that "special circumstances" existed to vary from a setback ordinance, because "the 'topography, location [and] surroundings' of the property reduced the number of potential uses for the site." *Medina*, 123 Wn.App. at 31.

Division One affirmed the Examiner, and further underlined that the city opposing the WCF had identified the area in question as needing better wireless coverage, and that "[W]ithout the setback variance, this property could not be used for that purpose." *Id.* at 32. Admittedly, providing better "wireless coverage" is not the reason Ms. Tjemsland

seeks this variance. The reason Ms. Tjemsland seeks this variance is because there is practically no other purpose to which this land could feasibly be used, as demonstrated by the substantial evidence above. Just as the hearing examiner in *Medina* found that not granting a variance would limit the "potential uses for the site," so did the Examiner in this case. Without question, the substantial evidence above demonstrates that the "potential uses" for the Tjemsland Property are quite limited, and the construction of a WCF is a potential and reasonable use.

If the Court in *Medina* would concur that substantial evidence existed to demonstrate "special circumstances" when a wireless provider was merely attempting to provide wireless coverage, surely this Court would concur that the Examiner correctly found "special circumstances" in this case. That is because the Tjemsland Property (1) is located on or near hazard areas, landslide areas, and gravel pits, among other topographical abnormalities that drastically differentiate her land to that of her neighbors; (2) much of the property is forested and has remained undeveloped since 1942, and timber harvesting would not be a feasible use for the property, as indicated by the Examiner at AR 1540 ¶ 2; and (3) the Tjemsland Property is uniquely situated—as being at the very top of Potholes Ridge, the "greatest single inhibiting factor" of wireless coverage in the area—for construction of a WCF, which was enough for

the affirmed hearing examiner in *Medina* to find "special circumstances." Surely, an "unprejudiced, rational person" would find that enough evidence exists to show "special circumstances," and therefore this Court should affirm the Examiner. *See Peste*, 133 Wn.App. at 477. His findings are supported by substantial evidence.

The DHH, at page 28, urges this Court to find that interpretation of the above evidence to find "special circumstances" would lead to "absurd" results. But this Court is limited to discern whether an "unprejudiced, rational person" would find enough evidence to agree with the "declared premise" that CCC 33.30.030 (1) is met, not whether the Findings would lead to "absurd" results. This Court is bound by the record below, not subjective interpretations of the evidence on appeal.

With respect to error No. 7, pertaining to whether the Examiner misapplied the *St. Clair* case in light of the facts, at pages 32-37, this Court should affirm the Examiner because the Findings are supported by substantial evidence. The Examiner was aware that 97% of the Tjemsland Property is unbuildable for the permitted uses, and this led the Examiner to the "declared premise" that the remainder of the property is "unsuitable for the permitted uses," and therefore that strict application of the height requirements would deprive Ms. Tjemsland of the "full use" of her land under *St. Clair*. AR 1540 ¶ 3. The DHH

believes this to be a "misapplication" of *St. Clair*. But that is not dispositive of whether substantial evidence supports the Examiner's conclusion as to "full use." This "misapplication" question is to be resolved under RCW 36.70C.130 (1)(b) analysis.

Additionally, *St. Clair* is inapposite on its facts, insofar as RCW 36.70C.130 (1)(c) is concerned. As admitted by the DHH at page 34, "the special circumstances [in *St. Clair*] were personal and did not relate to the property." The applicant in *St. Clair* "relied upon the assertion that an elderly and ailing sister needed a home nearby so Meamber could care for her." *St. Clair v. Skagit County*, 43 Wn.App. 122, 127, 715 P.2d 165, 168 (1986). In this case, an unprejudiced and rational person would find that the reason for this variance pertains to the size, shape, topography and location of the Tjemsland Property itself, and how this unique land may be used; the variance is not based upon personal desires, such as caring for an elderly relative.

Furthermore, and with respect to the DHH, the sign-size hypothetical set forth at pages 28-29 misunderstands form for substance. A sign advertises the use to which land shall be put. A WCF puts the land to use, whether the variance sought is classified by the DHH as a use or area variance. Respectfully, the DHH is incorrect at page 31 that the facts in this case are "very similar" to the above hypothetical. WCF

are treated under an entirely different section of the CCC, setting forth a separate scheme for adjudicating the use and placement of WCF.

The facts demonstrate no "special privilege"

Because Washington law provides limited guidance as to what constitutes a "special privilege," this Court should note that "[W]hether a variance constitutes a 'grant of special privilege' likewise turns on an objective inquiry: whether the variance allows the applicant to engage in conduct otherwise forbidden by" the local government. *Desert Outdoor Advertising Inc.v. City of Oakland*, 506 F.3d 798, 807 (9th Cir. 2007). The *Oakland* objective inquiry test was adopted by Judge Rohrer at CP 015, Lines 3-11, and should be adopted by this Court.

Concerning error No. 8, at pages 38-41, which involves whether granting the Proposal would confer a "special privilege" on Ms. Tjemsland, this Court should affirm the Examiner because the Findings are based on substantial evidence. Regardless of how the Examiner defined "special privilege"—using the Black's Law Dictionary definition of said phrase at AR 1541 ¶ 3—the Examiner was aware that not only Ms. Tjemsland would receive an increase in her cellular and FM coverage. So too would 11% (cellular) and 19% (FM) of the persons in the coverage area. AR 0521 ¶ 5-0522 ¶ 1. Furthermore, the Examiner

was made aware by Staff that this Proposal would be the first of its kind to utilize camouflage technology. AR at 0539 ¶ 2.

Additionally, the Examiner was aware that other permitted uses in NC zones in Clallam County, such as bed-and-breakfast inns and timber harvesting, support the ability of the landowner to profit from the use of the land, similar to renting space on a WCF to cellular providers. Therefore, by implication, granting the variance would not support "conduct otherwise forbidden by" Clallam County, under *Oakland* at 807.

Whether the Examiner was correct in determining that the existence of similar-in-height WCF in comparable zones meant that granting the variance would not confer a "special privilege" is a question to be resolved under RCW 36.70C.130 (1)(b). For now, the evidence would convince an unprejudiced and rational person of the "declared premise": that the Proposal would not confer a "special privilege." Based on the evidence above, a reasonable person would note that the Proposal would not be the only WCF granted in a rural zone that required a variance, and granting the variance would not confer upon Ms. Tjemsland alone the benefits of increased wireless coverage.

Regarding error No. 9, pertaining to the inadequacy of in-vehicle cellular coverage if the variance were not granted, at pages 41-43, the

Findings are supported by substantial evidence. That is because a reasonable person would note that T-Mobile submitted volumes of evidence arguing that there existed a "significant gap" in its wireless coverage, considering both in-vehicle and in-building, which represents the greater level of coverage. *See* AR 1211-1346. At AR 0522 ¶ 1 and 0532 ¶ 2, the Amended Report clearly indicates that all service types would be improved, including both in-building and in-vehicle coverage.[13] This Court should affirm the Examiner.

Land Use Decisions Are Based on Evidence, Not Public Perception

Because a land use decision may not be denied based on the "generalized fears of area residents" as to reductions in property values due to a particular proposal, this Court should affirm the Examiner. *See Sunderland*, 127 Wn.2d at 794 (recognizing the "important distinction between well founded fears" and "popular prejudices"). With respect to error No. 10, concerning whether the property values of DHH homeowners[14] would be affected by the Proposal, at pages 37 and 44-49, the Findings are supported by substantial evidence.

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[13] "T-Mobile has submitted their RF Analysis (Exhibit 9) that this proposal is needed to have adequate in-vehicle service."

[14] Appellant asserts that the homeowners living in close proximity to the Proposal—not the vast majority of lots that face north toward the Strait of Juan de Fuca—reside in a "high end" neighborhood, but offered no concrete evidence, beyond subjective assertions of fact, to prove what "high end" means.

This is so because the Examiner concluded that the submittals of the DHH did not provide "area specific evidence of a decrease in property values in the area of the proposed WCF." AR 1537 ¶ 1. Substantial evidence—three separate appraisals submitted by RPI at AR 1456-1483, specifically 1479 ¶ 2-7—demonstrates that living in close proximity to a WCF in Clallam County would have no conclusive effect on property values, positive or negative.

Again, weighing the credibility of the evidence is "for the trier of fact [the Examiner], not the appellate court." *Russell*, 70 Wn.App. at 421. Counsel for the DHH did not appear at the Hearing. Needless to say, counsel for the DHH did not reserve extra time to rebut the appraisal reports submitted by RPI. This Court is limited to the record before the Examiner. The DHH made no arguments pertaining to the above appraisal reports before the Examiner. The DHH cannot second-guess the fact-finder now. Of course, even if the DHH submitted evidence of "equal dignity"—instead of articles from the internet in addition to the "generalized fears of area residents" about property values—that would not serve as a basis to reverse the Examiner, under *Rosemere* at 827. Consequently, a reasonable person could find that the Proposal would not be "injurious to property," as the DHH contends.

based on the substantial evidence—which the DHH did not challenge before the Examiner—above.

Of course, in *Medina*, the applicant for a variance—T-Mobile, Inc.—produced limited market studies, before the hearing examiner, demonstrating no negative impact on property values by virtue of living near a WCF. *Id.* at 32. The city submitted testimony by a city planning consultant, who opined that the WCF at issue would have a negative impact on property values. *Id.* But the *Medina* court found that "none of that testimony is substantiated by factual evidence," similar to the Examiner at AR 1537 ¶ 1. *Id.*

Interestingly, the DHH relies on the testimony of Dianne Hood, a former real estate agent, as an "expert on real estate valuation," at page 47. Ms. Hood—who at no point claimed to be a licensed appraiser—conducted no research into comparable sales of real estate in Clallam County of those homes in close proximity to and/or distant from a cell tower. Instead, Ms. Hood proffered articles that were not based on appraisal evidence, but were "opinion surveys" that were conducted in 2005, "to investigate the *perceptions* of residents towards living near a cell tower and how this proximity might affect property values." AR 0407 ¶ 1 (emphasis added). These surveys reflect the sort of "general community opposition" that cannot serve as a basis to overturn a land

use decision, under *Sunderland* at 797. Whether Ms. Hood qualifies as an "expert" under ER 702 is irrelevant. The fact remains that the DHH submitted no evidence of "equal dignity"—before the Examiner—to demonstrate a cognizable effect on Clallam County properties by virtue of being near a cell tower. Land use decisions are not based on public perception. Land use decisions are based on evidence.

This Court should affirm the Examiner because weighing the credibility of the evidence is "for the trier of fact [the Examiner], not the appellate court." *Russell*, 70 Wn.App. at 421. Because RPI submitted three appraisal reports to the Examiner, not the superior court, relating to home values in Clallam County by virtue of being near a WCF—rather than internet surveys and articles from publications of general circulation—the Findings are supported by substantial evidence. An unprejudiced and rational person would find that the Proposal would not be "injurious to property" under CCC 33.30.030 (2), by virtue of the appraisal reports—showing no conclusive negative or positive effect on property values from living near a WCF—and the innumerable evidence regarding camouflaging techniques. Consequently, the DHH again fails to meet the burden of proof under RCW 36.70C.130 (1)(c).

With respect to error No. 11, as to whether RPI has met all of the variance criteria necessary for approval of the Proposal, this Court

should affirm the Examiner because the Findings are based on substantial evidence. In addition to the above substantial evidence, this Court must understand that the Proposal was already approved on three separate levels: Staff, the Examiner and Judge Rohrer. RPI cannot be asked to prove all seven variance criteria to an appellate court that spends none of its time interpreting and applying the CCC. That is the reason for the LUPA standards of review.

Based on the above, a reasonable person could find that substantial evidence supports the Findings, enough to refute any errors asserted under RCW 36.70C.130 (1)(c). This Court should affirm the Examiner.

No Erroneous Interpretation of the Law under RCW 36.70C.130 (1)(b). This Court should affirm the Findings because "[I]t is a well established rule of statutory construction that considerable judicial deference should be given to the construction of an ordinance by those officials charged with its enforcement.'" *Citizens for a Safe Neighborhood v. City of Seattle*, 67 Wn.App. 436, 440, 836 P.2d 235 (1992). Under the "erroneous interpretation" standard set forth at RCW 36.70C.130 (1)(b), Washington courts accord great deference to a local jurisdiction that interpreted its own regulations when reaching a decision. *See Chinn v. City of Spokane*, 173 Wn.App. 89, 95, 293 P.3d 401, 403 (2013). Again, the Examiner construed no "statutes of

statewide application" when reaching his Findings, nor was he required by law to do so. Instead, he construed the CCC and two court cases:

The Examiner's Interpretation of the Clallam County Code is entitled to Considerable Judicial Deference and should be Affirmed

This Court should affirm the Examiner because the Clallam County Comprehensive Plan ("Plan") clearly states that "[E]lectric and telecommunication services are needed throughout Clallam County," and the Examiner issued his Findings in accordance with that mandate. CCC 31.02.285 (7); *See Also* AR 1536 ¶ 3. Additionally, the Plan recognizes that "The telecommunications network to Clallam County is vital to quality of life of its citizens and economic development of the community." CCC 31.02.710. The CCC implements the Plan. Because the Examiner and Staff must interpret the CCC and Plan every day, the Examiner and Staff have more expertise in the siting of WCF in Clallam County than this Court, and the Parties.

With respect to error No. 1, involving setbacks, this Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of CCC 33.49.520 (2). Under the Code, setbacks for a WCF "shall be equal to 110 percent of the height of the support tower or 150 feet, whichever is greater." CCC 33.49.520 (2). 110 percent of 150 is 165. This 110% formula was applied by Staff in the Amended Report,

and Staff found that the 175-foot exclusive easement met the intent of the setback requirements—presumably because the exclusive easement eviscerates the property line and because the land at issue is solely owned by Ms. Tjemsland. AR at 0529 ¶ 2. The Examiner based his Findings on that recommendation.

Interestingly, the DHH alleges that the Examiner is entitled to "no deference," under *Griffin*, as opposed to "considerable deference" under *Chinn* and *Safe Neighborhood*, if his Findings "conflict" with the "plain language" of his own code. Respectfully, RPI submits that the Findings are not in conflict with the CCC because the scope and purpose of CCC 33.49.520 (2) is only applicable to Ms. Tjemsland under these facts. *See Morin*, 49 Wn.2d at 279.[15] Of course, if an individual landowner were to grant Ms. Tjemsland an exclusive easement restricting development on the property of both owners within 165 feet of the WCF, then the Examiner may be hard-pressed to apply the "plain language" of CCC 33.49.520 (2) without flying in the face of individual contract rights. Consequently, the Findings did not result from an erroneous interpretation of CCC 33.49.520 (2).

[15] This Court should note this this setback challenge was not raised before the Examiner with respect to the issuance of CUP 2015-0003, an application for a 100-foot WCF at the same location subject to the same setback requirements; consequently, this same challenge is arguably time-barred by RCW 36.70C.040 (3) (21-day period for filing appeal of a land use decision).

As for error No. 2, concerning siting priorities, this Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of CCC 33.49.400-410. This is because substantial evidence demonstrates that the Examiner was aware of exhaustive efforts to locate an area that would achieve wireless coverage objectives while at the same time protecting the visual and aesthetic resources of Clallam County. Additionally, CCC 33.49.400 (1) clearly sets forth "[C]riteria for prioritizing preference areas and siting," and the Examiner specifically applied each criteria enumerated therein to find that the WCF, despite being in a Preference 3 area, comported with the Plan and the CCC. AR 1536-1537 (compliance with the Plan); AR 1541 (compliance with CCC). And "considerable judicial deference" must be given to the Examiner's interpretation of his own code.

Ultimately, the DHH provides this Court with no authority evidencing that the Examiner must evaluate CCC 33.49.410 "line by line," or face reversal under RCW 36.70C.130 (1)(b). Consequently, the DHH has again failed to satisfy RCW 36.70C.130 (1)(b).

With respect to error No. 3, concerning height of the WCF, this Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of the CCC 33.49.520, in light of the whole record before the Examiner and the language of CCC 33.49.100, setting

forth the purposes and goals of CCC 33.49; and of course, because general community opposition cannot alone support reversal of a land use decision. *See Sunderland*, 127 Wn.2d at 797.

This Court should affirm the Findings because "[A] zoning ordinance is to be construed as a whole to ascertain the purpose and effect of a particular section." and the Examiner interpreted CCC 33.49 "as a whole" in reaching his Findings.[16] *Domwood Inc. v. Spokane County*, 90 Wn.App. 389, 396, 957 P.2d 775, 779 (1998). Surely, the "purpose and effect" of CCC 33.49.520 would not be to ban the construction of WCF over 100 feet in height in Preference 3 areas, in light of (1) the purposes and goals set forth under CCC 33.49.100; (2) RPI's exhaustive efforts to ensure adequate camouflage to blend the Proposal with the surrounding area, at AR 879 and 1006; and (3) the fact that the CCC specifically permits persons to vary from CCC 33.49.520.

Two goals of CCC 33.49 are to "[A]ccommodate an increased need for effective, efficient wireless communication services" while at the same time "protecting the scenic resources, property rights, and rural characteristics of Clallam County." CCC 33.49.100 (1)-(2). Based on his

[16] The Examiner specifically stated in the Findings that "The purpose of [CCC 33.49] is to ensure that WCF's are sited in a manner that minimizes adverse impacts to visual corridors. However, the chapter also emphasizes the [sic] Clallam County's need for the advancement of wireless telephonic communication." AR 1536 ¶ 3.

characteristics of Clallam County." CCC 33.49.100 (1)-(2). Based on his exhaustive analysis of the siting priorities set forth at CCC 33.49.400, at AR 1536-1539, the Examiner interpreted the height requirements in light of CCC 33.49 as a whole, with substantial evidence to support his analysis. Consequently, his Findings are entitled to great deference.

As for error No. 4, pertaining to the consistency of the Proposal with the CCC, this Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of the CCC. This is because of the above substantial evidence, and because the Examiner clearly delineated that his Findings must balance the need for effective wireless services with any visual impacts of the Proposal. AR 1536 ¶ 3. Respondents proffered volumes of evidence from trained experts in the field of wireless communications technology, camouflaging techniques, zoning and WCF design. RPI need not do so again. To find otherwise would contravene the policy of administrative finality outlined in LUPA. Instead, this Court should affirm the Examiner.

Because in every LUPA action, the courts shall review the administrative determination below "as a whole for substantial evidence supporting the decision," this Court should affirm the Examiner. *Curhan*, 156 Wn.App. at 35. With respect to error No. 5, which asserts that the conditional use permit and variance are simply invalid, this

Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of the CCC. Of course, error No. 5 is such a broad assertion that RPI will simply rest on the remainder of this brief, and the record below, to refute this error.

As for error No. 6, concerning whether special circumstances are applicable to the subject property, such that strict application of the height restrictions would deprive Ms. Tjemsland of the "rights and privileges" of neighboring property owners, this Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of CCC 33.30.030 (1):

First, when reading the CCC as a whole, under *Donwood* at 396, if the "purpose and effect" of CCC 33.30.030 (1) operated as the DHH contends, then every individual landowner in NC zones would be required to make use of their property in the exact same manner, despite the unique nature of their property. That is why a variance process has been enacted, in recognition that a parcel in a particular region may differ significantly from its neighbors and thus have a different "best use"—or "highest utility" under *Morin* at 279—from its more typical neighboring parcels.

Second, the Examiner presumably conducted a site visit; he was therefore able to witness the unique Tjemsland Property as related to the

surrounding neighborhood, to discern what "rights and privileges" exist in the surrounding neighborhood that may or may not exist for Ms. Tjemsland. ARP at 46, 8-10. Having viewed the site, presumably, the Examiner applied his understanding of the "rights and privileges" espoused in CCC 33.30.030 (1), as measured against the neighborhood as a whole, and as he has been delegated to do. Consequently, his Findings do not "conflict with the statutory language" of CCC 33.30.030 (1). Instead, his Findings are entitled to "considerable judicial deference." *See Safe Neighborhood*, 67 Wn.App. at 440.

Concerning error No. 8, which involves whether granting the variance and CUP would confer a special privilege on Ms. Tjemsland, this Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of 33.30.030 (4). The DHH alleges that because *St. Clair* reads that consideration of non-conforming uses "could" prove destructive to the purposes of a zoning ordinance, that that this Court should reverse the Examiner. *See St. Clair*, 43 Wn.App. at 168. This is not supported by the record. First, the DHH cites to no authority that consideration of non-conforming uses may *never* be utilized to discern whether a "special privilege" exists, or that these previously existing WCF are "non-conforming."

Second, even if the DHH cited to such authority—or authority that these WCF are "non-conforming"—substantial evidence exists to indicate that the finding of no "special privilege" was also based on (1) a clear increase in cellular coverage if the Proposal was granted—for the entire targeted coverage area—therefore demonstrating that the Proposal would not be granted to the benefit of Respondents alone, at the exclusion of others; and (2) clear facts showing that granting the Proposal would not permit Ms. Tjemsland to engage in "conduct otherwise forbidden by" Clallam County, when measuring the Proposal against the permitted uses in NC zones, pursuant to *Oakland* at 807.

Most importantly, the DHH has not cited authority or evidence that granting the Proposal would, in fact, contravene the zoning objectives set forth in the CCC. The DHH has only voiced subjective interpretations of the evidence and general community opposition. Furthermore, each time any person would seek to build an over-height WCF in the same zone, that person would still have to meet the stringent requirements for obtaining a variance under the CCC. This is true regardless of whether certain previously existing WCF are considered.

Additionally, this Court should note that the *Medina* Court, in one sentence, affirmed a hearing examiner's decision which found that a 20-foot height variance for a WCF was not a "special privilege" by virtue of

the height extension being an area variance, consistent with *Hoberg v. City of Bellevue*, 76 Wn.App. 357, 884 P.2d 1339 (1994), relied upon by the DHH at pages 36 and 37. *See Medina*, 123 Wn.App. at 30. This Court should affirm the Examiner: RPI seeks an area variance.

Regarding error No. 9, pertaining to the inadequacy of in-vehicle cellular coverage if the variance were not granted, this Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of CCC 33.49.530 (1). First, it is not for the DHH to argue what "adequate in-vehicle coverage" means before this Court, because the Examiner interpreted the CCC in reaching his Findings and interprets the CCC every day, unlike any person before this Court. The Examiner, as advised by planning Staff, makes this determination of adequacy. He has been delegated that authority by the county. Certainly, Judge Rohrer articulated that "[W]hether something as rapidly changing as wireless services is 'adequate' is open to a variety of interpretations." CP at 016, Lines 14-17. That is the reason for the standards of review, and the reason the Findings are entitled to considerable deference.

Second, for the Examiner to reach a different conclusion would have violated the Federal Telecommunications Act ("FTA"), 47 U.S.C. § 332(c)(7)(B)(i)(II), which specifically states that local zoning codes "shall not prohibit or have the effect of prohibiting the provision of

personal wireless services." A local zoning code, as applied to a particular application for a WCF, contravenes the above federal statute "if the proposed WCF was the least intrusive means for closing a significant gap in [wireless] coverage," and the application for said WCF is denied based on too narrow an application of said local zoning code. *Medina*, 123 Wn.App. at 36, Note 19, citing *Sprint Spectrum v. Willoth*, 996 F.Supp. 253, 257-258 (W.D.N.Y.1998).[17]

In this case, counsel for T-Mobile testified at the Hearing that T-Mobile is suffering a "significant gap" in the coverage area, and provided volumes of evidence demonstrating that gap—satisfying the second *Willoth* prong. ARP 28, 2-7; ARP at 31, 2-25. RPI submitted considerable evidence of a rigorous search for alternative sites, in addition to providing substantial evidence of adequate camouflage—demonstrating the "least intrusive means" of closing this significant gap. AR 0873-0897. Consequently, applying CCC 33.49.530 (1) as the DHH suggests would violate the FTA. Thus, the Examiner engaged in no erroneous interpretation of CCC 33.49.530 (1).

Land Use Decisions Are Based on Evidence, Not Public Perception

[17] *See Also T-Mobile U.S.A., Inc. v. City of Anacortes*, 572 F.3d 987, 997-998 (9th Cir. 2009) (finding that where a provider demonstrates a significant gap in coverage, inquired into the feasibility of other alternatives to fill this gap, and finds the facility that is the "least intrusive means" of filling this significant gap in wireless coverage, that a local government may not deny the provider the ability to fill that significant gap without violating the FTA).

With respect to error No. 10, which involves the Examiner's consideration of whether the property values of DHH homeowners would be affected by the Proposal, this Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of CCC 33.30.030 (2). Because the Examiner could not base his interpretation of the phrase "injurious to [Clallam County] property" under CCC 33.30.030 (2) on speculative injuries to property in general—as argued in opinion surveys and out-of-county publications—but based his Findings instead on area-specific evidence, at AR 1456-1483, his Findings are entitled to considerable judicial deference. In fact, better cell phone coverage may be advantageous for citizens rather than injurious because it may make their residences more attractive at the time of resale. This Court should affirm the Examiner.

As for error No. 11, regarding whether the RPI has met all of the variance criteria necessary for approval of the Proposal, this Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of the CCC. This assertion is so broad that RPI will rest on the record below to refute this error.[18]

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[18] Errors 13 (a)-(f) relate to the Examiner's interpretation of his own zoning code, as applied to the substantial evidence before him, and the Examiner, when interpreting his own code, is entitled to "considerable judicial deference" under *Safe Neighborhood*; and in every LUPA action, the appellate court must give

The Examiner's Interpretations of State Law

Washington Courts review interpretations of law de novo. *See Chinn*, 173 Wn.App. at 95. The Examiner utilized two Washington court decisions in reaching his Findings: *St. Clair v. Skagit County*, 43 Wn.App. 122, 715 P.2d 165 (1986); and *City of Medina v. T-Mobile USA, Inc.*, 123 Wn.App. 19, 95 P.3d 377 (2004). With respect to error No. 7, pertaining to whether the Examiner misapplied the *St. Clair* case in light of the facts, this Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of *St. Clair*. Under Washington law, "[R]easons for a variance must be reasons pertaining to the property itself which prevent full use of the property to the extent other properties in the vicinity and under the same zoning can be used." *St. Clair*, 43 Wn.App. at 126. The variance criteria of the CCC reflect that principle.

A specific goal of CCC 33.49 is to manage the siting of WCF while protecting scenic resources and "property rights." CCC 33.49.100 (2)(a). Because the Examiner was left to discern what was intended by the phrase "rights and privileges" in CCC 33.30.030 (1), he harmonized the phrase "rights and privileges" with the concept of "full use" established in *St. Clair*. Of course, the Examiner found that "full use" is something more

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"substantial deference to both the legal and factual determinations of a hearing examiner as the local authority with expertise in land use regulations." *Medina*, 123 Wn.App. at 24.

than using the land in the exact same manner as surrounding landowners. Admittedly, his interpretation of *St. Clair* is reviewed de novo. But in light of substantial evidence demonstrating that the Tjemsland Property is 97% unbuildable for the permitted uses in the applicable zone, and unlike any other property in the surrounding area, this Court may easily concur with the Examiner that strict application of the height requirements of CCC 33.49 would deprive Ms. Tjemsland of the "full use" of her land, i.e. the "rights and privileges" enjoyed by surrounding landowners. This Court should affirm the Examiner.

With respect to error No. 12, pertaining to whether the Examiner misapplied the *Medina* case in light of the facts, at pages 49-50, this Court should affirm the Examiner because the Findings are not based on an erroneous interpretation of *Medina*. Under *Medina*, if local law so authorizes, "a hearing examiner not only may consider the *adequacy of wireless services*, but indeed must consider [wireless] coverage and weigh it against the competing interests of aesthetics, retaining neighborhood character, and preserving property values," when deciding whether to grant a variance. *Id.* at 26.[19] (emphasis added).

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[19] Importantly, the *Medina* court did not hold that a hearing examiner must wait until he or she is satisfied that all local variance and CUP criteria are satisfied prior to performing *Medina* balancing; the *Medina* court also did not distinguish between "in-building" and "in-vehicle" wireless coverage.

Turning to the facts here, RPI successfully argued below that the Examiner is required by the CCC—or at the very least has the discretion—to conduct such balancing. AR 1348-1351. The Examiner conducted such balancing, "carefully weighing the costs and benefits" of approving the Proposal, clearly noting that the purpose of CCC 33.49 was to balance the need for efficient wireless services and the need to protect the visual resources of Clallam County; and he found that "any negative impacts are outweighed by the benefits by the proposed WCF." AR 1536 ¶ 3 and 1542 ¶ 4. The Examiner did so with the understanding that the majority of homes near the Proposal have their views to the north, toward the Strait of Juan de Fuca, and that RPI took great care to blend the WCF in with the surrounding land. AR at 0514 ¶ 6; AR 0877-0881.

Based on the above, this Court should find that the DHH has failed to demonstrate that RCW 36.70C.130 (1)(b) is met.

No Clearly Erroneous Application of the Law to the Facts under RCW 36.70C.130 (1)(d). To the extent that the DHH argues that the Findings are "clearly erroneous," the findings and conclusions of a hearing examiner are clearly erroneous under RCW 36.70C.130 (1)(d) only when "the court is left with the definite and firm conviction that a mistake has been committed." *Medina*, 123 Wn.App. at 24. Based on the Examiner's interpretation of the evidence submitted below—not on the

DHH's subjective interpretation of the evidence now—and the Examiner's application of the law to the facts, this Court could not be left with the "definite and firm conviction that a mistake has been committed" under RCW 36.70C.130 (1)(d). This Court should affirm the Examiner.

E. CONCLUSION

Based on the record, as a whole, the DHH has failed to prove that any of the standards of review under RCW 36.70C.130 (1) have been met. Respondents Radio Pacific, Inc. and Shirley Tjemsland respectfully request that this Court affirm the Examiner and Judge Erik Rohrer.

F. REQUEST FOR FEES

In accordance with RAP 18.1 (b), Respondents Radio Pacific, Inc. and Shirley Tjemsland respectfully request that this Court award Respondents reasonable attorney fees and costs, as the prevailing party in review of a land use decision, pursuant to RCW 4.84.370.

DATED this 11th day of September, 2017

Respectfully Submitted,

Eric Quinn, WSBA # 47354
Attorney for Respondents Radio Pacific, Inc. and Shirley Tjemsland

DECLARATION OF SERVICE

I, Eric Quinn, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the attorney for Respondents Radio Pacific, Inc. and Shirley Tjemsland. On the date indicated below, I filed this Response Brief at the Washington State Appellate Courts Web Portal, for Division Two, at https://ac.courts.wa.gov and per agreement with the parties by requesting copies be emailed to the following persons, as proof of service:

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Dated this 11th Day of September, at Gig Harbor, Washington

Eric Quinn

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September 11, 2017 - 9:55 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50144-9
Appellate Court Case Title:	Dungeness Heights Homeowners, Appellant v. Radio Pacific, Inc., et al., Respondents
Superior Court Case Number:	16-2-00226-1

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